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No. 86-473

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

GWALTNEY OF SMITHFIELD, LTD.,
Petitioner

—v.—

CHESAPEAKE BAY FOUNDATION, INC.
and
NATURAL RESOURCES DEFENSE COUNCIL, INC.,
Respondents

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF *AMICI CURIAE* BETHLEHEM STEEL CORPORATION, ACME STEEL COMPANY, ARMCO INCORPORATED, INLAND STEEL COMPANY, LTV STEEL COMPANY, INC., USX CORPORATION, AND AMERICAN IRON AND STEEL INSTITUTE IN SUPPORT OF PETITIONER

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Pursuant to Rule 36.2 of the Rules of this Court, Bethlehem Steel Corporation, Acme Steel Company, Armco Incorporated, Inland Steel Company, LTV Steel Company, Inc., USX Corporation, and American Iron and Steel Institute submit this brief as *amici curiae* in support of the Peti-

tioner, Gwaltney of Smithfield, Ltd. ("Gwaltney"). All parties to this case have consented to the filing of this brief, as evidenced by letters of consent filed with the Clerk of this Court.

STATEMENT OF INTEREST OF *AMICI CURIAE*

Amici Bethlehem Steel Corporation ("Bethlehem"), Acme Steel Company ("Acme"), Armco Incorporated, Inland Steel Company, LTV Steel Company, Inc., ("LTV Steel"), and USX Corporation are engaged in the manufacture of iron and steel. Each holds one or more National Pollutant Discharge Elimination System ("NPDES") permits issued pursuant to the Federal Water Pollution Control Act, 33 U.S.C. § 1251 et seq., also known as the Clean Water Act ("the Act").[1] All but Acme and LTV Steel have been defendants in at least one citizen suit under section 505 of the Act, 33 U.S.C. § 1365.

Amicus American Iron and Steel Institute ("AISI") is a trade organization composed of manufacturers, processors, and other producers of iron and steel and related products, including all corporate *amici*. Virtually every member of AISI is subject to regulation under the Clean Water Act, and many of them also have been defendants in citizen suits. AISI presents the views of its members on legal issues and issues of public policy which are of concern to its members.

Amici support the proposition urged by Gwaltney that the Clean Water Act does not authorize private citizens to sue for civil penalties for purely past violations of the Act. The

1. All citations to the Act herein incorporate relevant amendments under the Water Quality Act of 1987, Pub. L. No. 100-4, 101 Stat. 7 (1987), unless otherwise noted.

question we brief is of much broader scope and concern, however. *Amici* believe that this case raises important issues concerning the constitutionality of the Clean Water Act citizen suit provision and the fair, effective enforcement of the Act. *Amici* submit that the Clean Water Act's grant to private citizens of a license to prosecute actions on behalf of the government violates Article II of the Constitution. This unconstitutional statutory scheme has resulted in unjust, inconsistent, and improper execution of the Act.

SUMMARY OF THE ARGUMENT

As interpreted by many federal district courts and by the district and circuit courts in this case, section 505 of the Clean Water Act authorizes "any citizen" to bring a civil action in federal court to enforce any standards, limitations, or orders promulgated under the Act—essentially displacing the system of governmental enforcement created by Congress in the Act's other provisions. The citizen plaintiffs, most of whom are environmental interest organizations suing in a representative and corporate capacity, are not subject to the restraints on governmental enforcement.[2] But in every citizen suit seeking civil penalties for alleged violation of the Clean Water Act, the exclusive interest advanced is that of the government, not the citizen plaintiffs.

The citizen suit provision of the Clean Water Act thus unconstitutionally vests power to enforce the law in persons who are not duly appointed Officers of the United States. Citizen plaintiffs are permitted to bring enforcement actions as to which they have no personal stake in the outcome, to vindicate only the government's interest, without any accountability to the President or other Officer of the

2. For an extensive review of the use that these organizations have made of the Clean Water Act citizen suit provision and the abuse that may have resulted, the Court is respectfully referred to the *Amicus Curiae* brief of the Connecticut Business and Industry Association filed in support of the Petition for Writ of Certiorari in this case. *Amici* expressly adopt the arguments set forth therein.

United States appointed pursuant to Article II. In a complex regulatory scheme such as the Clean Water Act, the national goals of uniform, fair and effective enforcement of the law are undermined by permitting private persons with no executive authority or responsibility to usurp and disrupt the execution of the law by the Executive Branch.

If this Court rules in favor of Gwaltney it may not be necessary to reach the constitutional issue briefed herein. We urge the Court, nevertheless, to consider the serious constitutional implications of reading the Clean Water Act to permit private citizens to sue for civil penalties payable to the Treasury.

I. Only the Government's Interest Is Involved in a Citizen Suit for Civil Penalties under Section 505 of the Clean Water Act.

The Federal Water Pollution Control Act (Clean Water Act) created a two-tiered, federal-state partnership to achieve the statutory objective of restoring and maintaining the quality of the nation's waters. The United States Environmental Protection Agency ("EPA" or "the Agency") plays the lead role in this partnership, with primary responsibility for: (1) collecting, generating, and disseminating information, §§ 1314(a), (c), (d), (f), (j), and 1342(p), *inter alia;* (2) establishing and approving guidelines and standards, §§ 1311, 1312, 1313(b), 1314(b), (f)-(i), 1317, 1342(p), 1345(d); (3) applying established guidelines and engineering judgment in issuing and reviewing permits, and granting certain variances from established standards, §§ 1311(g), (h), (n), 1342(a), (d)-(f); and (4) monitoring and enforcing compliance, §§ 1319, 1342(h), (i). A number of options are available to EPA when it determines that enforcement is appropriate, including administrative abatement and compliance orders, § 1319(a); administrative penalties, § 1319(g), civil actions for injunctive relief or civil penalties, or both, § 1319(b), (d); and criminal enforcement, § 1319(c). See also § 1319(f).

States also have important responsibilities under the Act. They establish and revise water quality standards, with the approval of EPA, § 1313(a), (c); identify special water quality problems, their sources, and control strategies, §§ 1313(d), 1314(l); implement continuous water quality planning, § 1313(e); and consult with EPA on numerous issues arising under the Act. States also may develop approved programs under which they issue and enforce discharge permits, subject to EPA's right to enforce where a state declines to do so after notice, or in the event of a state's widespread failure to enforce. §§ 1319(a), 1342(b)-(c), 40 C.F.R. Part 123. State enforcement options must be similar to EPA's in order for a state to obtain program approval. § 1342(b)(7).

The Clean Water Act thus establishes a complex scheme in which EPA and the states play complementary roles. Individual states exercise a fair degree of autonomy, while EPA ensures nationwide consistency in implementation of the Act through its policy-making, standard-setting, and oversight activities, as well as its ultimate enforcement authority. It is EPA's ability to coordinate the execution of the Act which makes uniform, fair, and effective enforcement possible.

Nothing about the Clean Water Act as described thus far is constitutionally objectionable. What makes the Act offensive to the Constitution is its provision for parallel, yet completely separate and distinct, enforcement by private citizens. Under section 505 of the Act, citizens who allege that they meet minimal standing requirements[3] may seek

3. Bald allegations of harm to one's aesthetic sensibility or recreational interest are sufficient to establish standing to sue. *Sierra Club v. Morton*, 405 U.S. 727 (1972); *Sierra Club v. SCM Corp.*, 747 F.2d 99 (2d Cir. 1984); *Sierra Club v. Simkins Indus.*, 617 F. Supp. 1120, 1131 (D. Md. 1985). For a discussion of the particular importance of standing as a safeguard against the usurpation of the executive function, see Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 Suffolk U.L. Rev. 881, 894-97 (1983).

enforcement of a perceived violation of the Act in a federal district court, without regard to or, in many cases, despite EPA's or a state's determination that enforcement is not warranted. As interpreted by a number of lower courts, the Act authorizes any citizen to bring an enforcement action in federal court, without having an interest in the outcome of the suit which is distinguishable from the interest of any other citizens or the government itself.

Under section 505(a)(1), any citizen may bring a civil action in a federal district court against

> any person who is alleged to be in violation of (A) an effluent standard or limitation . . . or (B) an order issued by the Administrator [of EPA] or a State with respect to such a standard or limitation . . . .

33 U.S.C. § 1365(a)(1). Prior to bringing such an action, a citizen must provide EPA, the appropriate state agency and the alleged vio' 'or sixty days' written notice of the citizen's intention to file suit. § 1365 (b)(1)(A). While EPA may intervene in the suit as a matter of right, there is no requirement that it do so. § 1365(c)(2). If a citizen complies with the Act's sixty-day notice provision, and no administrative action was previously commenced or administrative penalty paid under section 309(g) of the Act, there is no statutory bar to a citizen suit unless, *prior to* the filing of the citizen's complaint, EPA or the state "has commenced and is diligently prosecuting" a separate civil or criminal action to require compliance. § 1365(b)(1)(B). Once the statutory conditions to filing a citizen suit complaint have been met, the district court is required to take jurisdiction. If a violation of the Act is proved, the district court is to determine whether "to apply any appropriate civil penalties," § 1365(a), of up to

$25,000 per day[4] for each violation under section 309(c) and (d) of the Act, 33 U.S.C. § 1319(c), (d).[5]

When Congress authorized private citizens to seek and district courts to award civil penalties, it also clearly indicated that citizen plaintiffs were not to derive any monetary benefit from a successful citizen suit. The Senate Report that accompanied the Clean Water Act is explicit on this point: "any penalties imposed would . . . not be recovered by the complainant."[6] In holding that the Clean Water Act did not create a private cause of action for damages, this Court noted that any civil penalties awarded in a citizen suit would have to be paid to the federal treasury as miscellaneous receipts. *Middlesex County Sewerage Authority v. National Sea Clammers Association*, 453 U.S. 1, 14 n.25 (1981). Having no right to moneys payable to the Treasury, citizen suit plaintiffs have no more interest in a civil penalty than any other citizen.[7] The funds, once paid, belong exclusively to the government. Congress intended that the exclusive bene-

4. Prior to the enactment of the Water Quality Act of 1987 the maximum penalty was $10,000 per day of violation.

5. In *Stoddard v. Western Carolina Regional Sewer Authority*, 784 F.2d 1200, 1208 (4th Cir. 1986), the court found that the language of § 309(d) "leaves little doubt that, under the circumstances of [that] case, a penalty in some form is mandated."

6. S. Rep. No. 414, 92d Cong., 1st Sess. 79, *reprinted in* 1972 U.S. Code Cong. & Ad. News 3668, 3745, *and in* EPA, *Legal Compilation (Water)*, Supp. 1, vol. 1, at 90, 168 (1973). The House Committee on Public Works stated similarly that "[t]he penalties imposed would be deposited as miscellaneous receipts in the treasury and not be recovered by the citizen bringing the suit." H.R. Rep. No. 911, 92d Cong., 2d Sess. 133, *reprinted in* EPA, *Legal Compilation (Water)*, Supp. 1, vol. 1, at 205, 337 (1973).

7. This Brief addresses only the constitutional infirmity of citizen suits for civil penalties payable to the Treasury. The question whether injunctive relief could be sought in citizen suits without running afoul of the constitutional principles implicated by suits for civil penalties is not before the Court. Respondents Chesapeake Bay Foundation, Inc. and Natural Resources Defense Council, Inc. have alleged no facts that would entitle them to injunctive relief.

ficiary of civil penalties awarded in a Clean Water Act case would be the government.

Reduced to its essence, section 505 is an open invitation to any citizen to assume the mantle of government for the purpose of enforcing the Act.[8] This violates the fundamental constitutional principle that the determination whether and by what means the law will be enforced is exclusively within the executive authority of the President.[9] To ensure, *inter alia*, accountability and consistency in the execution of the laws, the Framers vested "the executive Power . . . of the United States" in the President. U.S. Const. art. II, § 1, cl. 1. *Amici* respectfully assert that Congress exceeded its constitutional powers when it granted citizens the purported right to bring enforcement actions under section 505 for civil penalties payable solely to the federal treasury.[10]

II. Citizens Bringing Enforcement Actions under the Clean Water Act Purport to Exercise a Power Exclusively Reserved to Executive Officers Appointed under Article II of the Constitution.

The President, as Chief Executive Officer of the United States, is constitutionally charged with executing federal law. His right and duty to execute the laws are encom-

8. The plethora of citizen suits is not surprising, given the application of strict liability, *Connecticut Fund for the Environment v. Job Plating Co.*, 623 F. Supp. 207, 218 (D. Conn. 1985), and the Act's grant of authority to award counsel fees and litigation responses to a "prevailing or substantially prevailing party," 33 U.S.C. § 1365(d).

9. *Amici* certainly do not question the authority of the courts or heads of departments to appoint inferior Officers when such appointment is authorized by statute. Art. II, § 2, cl. 2. Unlike independent counsel or special prosecutors, private citizens suing under § 505 have not been appointed by, and so are not subject to the supervision of, any persons authorized to do so under Article II. *See infra* note 12.

10. *Contra, Chesapeake Bay Foundation, Inc. v. Bethlehem Steel Corp.*, Civ. No. Y-84-1620, slip op. at 1-10 (D. Md. Jan. 30, 1987). *See also Student Public Interest Research Group of New Jersey v. Monsanto Co.*, 600 F. Supp. 1474, 1478-79 (D.N.J. 1985).

passed within the broad grant of executive power in Article II, section 1, clause 1—"The executive Power shall be vested in a President of the United States of America"[11] —and explicitly imposed by section 3 of the same Article: "[H]e shall take Care that the Laws be faithfully executed . . . ." The President is to exercise that right and duty by appointing, supervising, and, if necessary, removing those who execute the laws, pursuant to Article II, § 2, cl. 2, and the Decision of 1789.

Article II, section 2, clause 2 of the Constitution provides that the President

> shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law; but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

The Appointments Clause sets forth the exclusive procedure for selecting and authorizing those persons who may execute the laws on behalf of the United States. Unless another provision of the Constitution provides otherwise, the President "shall" nominate and appoint "Officers of the United States" with the advice and consent of the Senate. In the case of "inferior Officers," Congress may by law vest the right to appoint them in the President alone, in the courts, or in the heads of executive departments. *Buckley v. Valeo*,

11. *See, e.g., Myers v. United States*, 272 U.S. 52, 117 (1926) ("The vesting of the executive power in the President was essentially a grant of the power to execute the laws.").

424 U.S. 1, 127 (1976).[12] These are the *only* methods by which Officers of the United States may be selected.[13]

The power to remove Officers of the United States from their positions also is vested in the President, except where Congress chooses to avail itself of the remedy of impeachment. *Cf. Bowsher v. Synar*, 106 S. Ct. 3181, 3187–88 (1986). The removal power has been acknowledged as properly a part of the President's executive authority since the first session of the First Congress in 1789. *Myers v. United States*, 272 U.S. 52, 111–57 (1926). As recounted in *Myers*

12. The phrase "Heads of Departments," used as it is in conjunction with the phrase "Courts of Law," suggests that the Departments referred to are themselves in the Executive Branch or at least have some connection with that branch. While the Clause expressly authorizes Congress to vest the appointment of certain officers in the "Courts of Law," the absence of similar language to include Congress must mean that neither Congress nor its officers were included within the language "Heads of Departments" in this part of cl. 2.

Buckley v. Valeo, 424 U.S. 1, 127 (1976); *see also id.* at 128–29.

13. Unless their selection is elsewhere provided for, *all* officers of the United States are to be appointed in accordance with the [Appointments] Clause. . . . No class or type of officer is excluded because of its special functions. The President appoints judicial as well as executive officers. Neither has it been disputed . . . that the Clause controls the appointment of the members of a typical administrative agency even though its functions, as this Court recognized in *Humphrey's Executor v. United States*, 295 U.S. 602, 624 (1935), may be "predominantly quasi-judicial and quasi-legislative" rather than executive. The Court in that case carefully emphasized that although the members of such agencies were to be independent of the Executive in their day-to-day operations, the Executive was not excluded from selecting them. *Id.*, at 625–626.

Id. at 132–33 (emphasis in original). *See also United States v. Germaine*, 99 U.S. 508, 509–10 (1878) ("That all persons who can be said to hold an office under the government about to be established under the Constitution were intended to be included within one or the other of these modes of appointment there can be but little doubt." *Id.* at 510).

and other sources,[14] spirited debate in that first session of Congress led to "a legislative declaration that the power to remove officers appointed by the President and the Senate vested [by virtue of the Constitution] in the President alone." *Id.* at 114.

The *Myers* Court noted that the President may have need to "supervise and guide" those who execute the laws in their construction of the statutes which they enforce, "in order to secure that *unitary and uniform execution of the laws* which Article II of the Constitution evidently contemplated in vesting general executive power in the President alone." 272 U.S. at 135 (emphasis added).

> Furthermore, [l]aws are often passed with specific provision for the adoption of regulations by a department or bureau head to make the law workable and effective. The ability and judgment manifested by the official thus empowered, as well as his energy and stimulation of his subordinates, are subjects which the President must consider and supervise in his administrative control.

Id. Even where duties may be "peculiarly and specifically committed to the discretion of a particular officer," or quasi-judicial in nature, the President may remove an officer on the ground that the discretion statutorily entrusted to him "has not been on the whole intelligently or wisely exercised. Otherwise [the President] does not discharge his own constitutional duty of seeing that the laws be faithfully executed." *Id.*

It is clear that to ensure proper execution of the laws the President must have *responsibility*, in the form of both political accountability and unitary control and supervision, to ensure uniform implementation of the laws. These principles underlie Article II itself, the powers granted therein, and

14. *See, e.g.*, C. Thach, *The Creation of the Presidency 1775-1789* at 140-65 (1969).

those derived from it. These very principles are violated and Article II is contravened by citizen suits for civil penalties under section 505 of the Clean Water Act.

Section 505's purported grant of authority to self-appointed citizen enforcers to perform the "core" executive function of bringing enforcement suits on behalf of the government offends Article II, under which only the President and executive Officers may be charged with executing the laws of the United States. *Bowsher v. Synar*, 106 S. Ct. 3181, 3187–89, 3191 (1986); *Buckley v. Valeo*, 424 U.S. 1, 118–19, 126 (1976). *Buckley* and *Bowsher* examined the nature of statutorily authorized actions in order to determine whether the authorizations were consistent with Article II. The critical question in both cases was whether delegated powers involved "execution of the law" in a constitutional sense. *Buckley*, 424 U.S. at 137–41; *Bowsher*, 106 S. Ct. at 3191–92. Finding that they did, this Court held that the powers in question constitutionally could not be assigned to persons who were not appointed (*Buckley*) or removable (*Bowsher*) in accordance with Article II. *Buckley*, 424 U.S. at 140–41; *Bowsher*, 106 S. Ct. at 3192.

Buckley and *Bowsher* provide complementary statements of the test to be applied in such cases. According to *Buckley*, the proper inquiry is whether the assigned powers involve the exercise of "significant authority pursuant to the laws of the United States." 424 U.S. at 126. *Bowsher* phrased the test in the negative: whether the powers are "essentially ministerial and mechanical so that their performance does not constitute 'execution of the law' in a meaningful sense." 106 S. Ct. at 3192. Only Article II Officers or their designees may exercise "significant authority" pursuant to federal law or "execute the law."

Authority to bring civil actions for the imposition of civil penalties payable to the federal treasury is manifestly significant. It also is unquestionably part of the executive func-

tion. Such

> enforcement power, exemplified by . . . discretionary power to seek judicial relief, is authority that cannot *possibly* be regarded as merely in aid of the legislative function of Congress. *A lawsuit is the ultimate remedy for a breach of the law,* and it is to the President . . . that the Constitution entrusts the responsibility to "take Care that the Laws be faithfully executed."

Buckley, 424 U.S. at 138 (citation omitted and emphasis added); *see also id.* at 139–40. Moreover, any decision whether to bring a legal action necessarily requires the exercise of "judgment concerning facts that affect the application" of the law—hardly a ministerial or mechanical function. *Bowsher,* 106 S. Ct. at 3192. Citizen suits for civil penalties under section 505 thus clearly constitute "execution of the law" within Article II, and the grant of authority to bring such suits to persons who are not appointed by the President or subject to his supervision and removal is unconstitutional.[15]

III. Citizens Are Not Subject to Any of the Constraints which Apply to the Exercise of Enforcement Discretion by EPA and the States.

The constitutional flaw in authorizing execution of the law by private citizens is of much more than theoretical significance under the Clean Water Act. Judicious and consistent exercise of enforcement discretion is critical to the fairness,

15. *Qui tam* actions sometimes have been cited wrongly as precedent for or analogous to citizen suits under § 505. *See, e.g., Chesapeake Bay Foundation v. Bethlehem Steel Corp.,* 608 F. Supp. 440, 449 (D. Md. 1985). *"Qui tam"* is a shortened form of a Latin phrase which means "who as well for the lord the king as for himself sues," and *qui tam* plaintiffs are entitled to receive a portion of any penalties recovered. *See, e.g.,* 31 U.S.C. § 3730, which provides for civil actions by informers under the False Claims Act, and entitles such informers to up to 25 percent of the proceeds of their suits. § 3730(b), (c)(2). Under § 505, however, any civil penalties obtained are payable only to the Treasury—citizens have no claim on the proceeds. We have been unable to find any reported decision addressing the constitutionality of *qui tam* actions in the face of a challenge under Article II.

consistency, and ultimately the integrity of the NPDES permitting program. The permitting program is, in turn, central to the Act's highly complex, technology-based regulatory scheme to improve the quality of the nation's waters. Decisions whether, when, why, and against whom to bring enforcement actions thus go to the heart of the overall purpose of the Act. There is no more "significant authority" pursuant to the Clean Water Act than to sue in federal court to enforce it.

EPA and the state agencies charged with responsibility to enforce the Act and to monitor compliance with NPDES permits issued thereunder must have discretionary authority in their enforcement activity. Among the major long-term goals of the Act are the promotion of voluntary compliance with established standards and limitations wherever possible, and the "return [of] all noncomplying permittees to compliance as quickly and efficiently as practicable." EPA Office of Water, Compliance/Enforcement Strategy for the Clean Water Act 24 (1983). The most efficient means to ensure compliance often will not be an enforcement action. EPA's policy guidelines for enforcement personnel include various considerations to be taken into account in determining an appropriate "level of enforcement response," including "fairness and equity, national consistency and the integrity of the NPDES program."[16] Moreover, EPA has

16. EPA's guidance documents state that

> [w]hen making determinations on the level of the enforcement response, the technical and legal staff should consider the degree of variance from the permit condition or legal requirement, the duration of the violation, previous enforcement actions taken against the violator, and the deterrent effect of the response on the similarly situated regulated community. Equally important are considerations of fairness and equity, national consistency and the integrity of the NPDES program.

EPA Office of Water, The Enforcement Management System: National Pollutant Discharge Elimination System (Clean Water Act), Attachment B: Enforcement Response Guide 1 (1986). *See also id.*, Attachment A: Violation Review Process 1-2 (noting that the decision to bring an enforcement action should not be based solely on whether there has been a violation, and setting forth other factors to be considered).

issued a Civil Penalty Policy to guide its personnel in calculating an appropriate penalty in enforcement actions. This policy was prepared, in part, to further the Act's goals of "deterrence, [and] fair and equitable treatment of the regulated community." EPA Civil Penalty Policy, Env't. Rep. (BNA) (Fed. Laws) 41:2991 (Feb. 16, 1984).

EPA and the regulated community have operated under the shared assumption that when Congress mandated the establishment of technology-based standards and limitations under the Act it was, in a sense, requiring EPA to reach some reasonable compromise between the limits of engineering capability and predictability, on the one hand, and the technology-forcing goals of the Act on the other. EPA performs studies and then establishes standards and Effluent Limitations Guidelines ("ELGs") at levels which it believes can be justified as a general matter,[17] while essentially conceding that permittees cannot necessarily achieve one hundred percent compliance with them. The reality is that, in setting its standards, EPA has relied on enforcement discretion as a safety valve to relieve the unfairness of a rigid liability scheme applied to uncertain and predictive standards, and the courts have approved this approach. *Weyerhaeuser Co. v. Costle*, 590 F.2d 1011, 1057–58 (D.C. Cir. 1978); *CPC International, Inc. v. Train*, 540 F.2d 1329, 1338 (8th Cir. 1976), *cert. denied*, 430 U.S. 966 (1977). *But cf. Marathon Oil Co. v. EPA*, 564 F.2d 1253, 1272–73 (9th Cir.

17. For a general discussion of the process by which EPA develops ELGs, see 38 Fed. Reg. 21202, 21202–03 (Aug. 6, 1973).

1977); *FMC Corp. v. Train*, 539 F.2d 973, 986 (4th Cir. 1976).[18]

Some permit exceedances result from circumstances which are simply beyond the reasonable control of permittees. EPA's "bypass" and "upset" regulations, 40 C.F.R. § 122.41(m), (n), address certain exceptional incidents of this nature, but those regulations do not cover all such incidents. EPA recognizes that its upset and bypass regulations fail to address certain permit exceedances which should be excused. It therefore relies upon enforcement discretion as a supplement to the upset and bypass exceptions to strict liability.[19]

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18. *See also* Preamble to Proposed Iron and Steel Manufacturing Point Source Category Effluent Limitations Guidelines, Pretreatment Standards, and New Source Performance Standards, 46 Fed. Reg. 1858 (January 7, 1981). This preamble addresses enforcement discretion as follows:

> One additional topic that warrants discussion is the operation of EPA's NPDES enforcement program, *many aspects of which have been considered in developing this regulation.* The Agency wishes to emphasize that, although the CWA is a strict liability statute, the initiation of enforcement proceedings by EPA is discretionary. EPA has exercised and intends to exercise that discretion in a manner which recognizes and promotes good faith compliance efforts and conserves enforcement resources so as to maximize their availability for actions against those who fail to make good faith efforts to comply with the Act.

46 Fed. Reg. at 1870 (emphasis added). The preamble to the Final Rule contains virtually the same language. 47 Fed. Reg. 23258, 23281 (May 27, 1982).

19. *See, e.g.*, 49 Fed. Reg. 37998, 38038–39 (September 26, 1984) (stating that the NPDES regulations would not include a formal upset defense for exceedances of water-quality-based permit limitations because it would not be "practical" to implement; instead, the Agency would "continue to evaluate such discharges on a case-by-case basis and use its discretion in deciding whether to bring an enforcement action."); 44 Fed. Reg. 32854, 32862–63 (June 7, 1979) (indicating that the Agency will consider factors not expressly included in the "bypass" regulations when exercising its discretion to enforce against permit exceedances caused by the bypassing of pollution control equipment, and that even where a permittee cannot identify the cause of an alleged upset, "the Agency may still exercise prosecutorial discretion not to enforce in situations where it is not warranted.")

In cases where no generally applicable ELG or other standard has been promulgated for a particular effluent or discharge, a permit writer exercises "Best Professional Judgment" to establish a limitation in a particular permit. Limitations derived in this manner are necessarily predictive in nature, and the best judgment of even a knowledgeable permit writer may be mistaken.[20] There is virtually no recourse for permittees unfortunate enough to find themselves subject to permit limitations based upon such erroneous predictions, other than reliance upon the good faith exercise of enforcement discretion by the executive agency charged with enforcement responsibility.[21] The exercise of enforcement discretion is essential to assure equitable enforcement of the law in such cases.

Private citizens who bring civil actions for penalties under section 505 are not subject to EPA's enforcement guidelines and policies or to the constraints of good faith and fair dealing which apply to all administrative agencies. They

20. At least one court has noted, and EPA has tacitly admitted, that occasionally the Agency's prediction of what results a given technology will produce may simply be incorrect. *FMC Corp. v. Train*, 539 F.2d 973, 984 (4th Cir. 1976); Preamble to Final National Pollutant Discharge Elimination System Permit Regulations, 49 Fed. Reg. 37998, 38039–40 (September 26, 1984) (noting that the regulations as of that date did not allow modification of a permit during its term on the grounds of either mistaken prediction by the permit writer or failure of technology, and indicating that the allowable bases for permit modification were being expanded to include such grounds, effective October 26, 1984). The relevant permit modification provision has been codified at 40 C.F.R. § 122.62(a)(17). *Cf.* 33 U.S.C. § 1342 (o)(2)(B)-(E).

21. Even permittees who are unable to comply with their permits due to mistaken prediction or failure of technology, and who since late 1984 may qualify for permit modification under 40 C.F.R. § 122.62(a)(17), are subject to liability under the Act. They too must rely on the good faith exercise of enforcement discretion by the executive agencies with respect to those permit exceedances which occur prior to any permit modification.

may have no interest in the effective, fair, nationally uniform, and constitutional enforcement of the statute. Moreover, their exercise of the unlimited authority to bring suit granted by section 505 can and does interfere with execution of the Act by EPA and state agencies.

IV. Citizen Suits for Civil Penalties under Section 505 Interfere with Executive Enforcement of the Act and Produce Inconsistent and Unjust Results.

Citizen plaintiffs under section 505 have been viewed as "standing in the shoes of" EPA or state enforcement agencies, and as seeking the same relief. *See, e.g., Chesapeake Bay Foundation v. Bethlehem Steel Corp.*, 608 F. Supp. 440, 448 (D. Md. 1985). The Bethlehem court held that citizens therefore should have at least as long a period in which to bring enforcement actions as EPA would have—and a longer period than a state enforcing agency would have with respect to the very same alleged violations. *Id.* at 446–50 (federal five-year period of limitations applies to citizens, rather than one- or three-year state statutes of limitations).[22] The Bethlehem court reasoned that citizens' "'recourse to the courts is appropriate only when the administrative action taken is less than adequate,'" and that "[a] citizen has no opportunity to determine whether the EPA administrative enforcement procedures are adequate until the limitations period for the EPA has nearly passed." *Id.* at 448, quoting in part *Massachusetts v. United States Veterans' Administration*, 541 F.2d 119, 121 (1st Cir. 1976). *Accord, Student Public Interest Research Group of New Jersey v. Tenneco Polymers, Inc.*, 602 F. Supp. 1394, 1399 (D.N.J. 1985).

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22. The *Bethlehem* court recognized the need for national uniformity in the enforcement of the Clean Water Act when it rejected the analogous one-year state statute of limitations in favor of the five year statute provided in 28 U.S.C. § 2462, 608 F. Supp. at 447–50. *See, e.g., id.* at 448 ("The application of a state statute of limitations would . . . produce non-uniform enforcement as between citizens and the government.").

Aside from the question of what standards citizens or the courts are to apply in determining whether governmental enforcement is "adequate," the quoted language from the *Bethlehem* case raises at least two important issues. First, how do citizen suits for civil penalties affect the overall execution of the Act, in terms of the timing or sequence of private and governmental enforcement actions? Second, how do such suits affect the overall execution of the Act when they seek penalties for alleged violations which federal and state authorities have determined not to be proper subjects for enforcement? These issues will be addressed separately.

Citizen suits threatened and instituted in recent years have raised thorny problems of consistency and finality of decisions relating to governmental enforcement under other provisions of the Act. Whether couched in terms of issue or claim preclusion, "diligent prosecution" under section 505(b)(1)(B), administrative prerogative or efficiency, or basic fairness, the problems all concern the tension between executive enforcement and citizen enforcement of the Act. Should preclusive effect be given to governmental enforcement actions instituted and concluded prior to the issuance of citizens' sixty-day notice letters, those instituted after the issuance of such letters, or others instituted after commencement of a citizens' suit? At least one court has held that a civil enforcement action instituted and concluded by the State of Connecticut prior to institution of a citizen suit did not bar a later citizen suit on the same alleged violations. *Connecticut Fund for the Environment v. L & W Industries*, 631 F. Supp. 1289, 1291 (D. Conn. 1986). *But see Student Public Interest Research Group of New Jersey v. Georgia-Pacific Corp.*, 615 F. Supp. 1419, 1432 (D.N.J. 1985) (prior EPA enforcement action barred subsequent citizens' litigation on violations adjudicated therein).

Amici believe that the *L & W Industries* case was wrongly decided. That decision demonstrates, however, the lengths to which some courts have gone in interpreting section 505

to authorize citizens' second-guessing of governmental enforcement under the Act. Duplicative enforcement actions necessarily waste private and judicial resources. The most serious defect of such actions, however, is their obvious potential to produce unfair results and inconsistent, unnecessary, and redundant enforcement proceedings, thus interfering substantially with executive implementation of the Act.

Other forms of citizen interference with executive administration of the Act are less obvious but equally significant. By requiring citizens to give notice of their intent to sue, 33 U.S.C. § 1365(c)(3), Congress clearly intended to trigger administrative review of the alleged violations and to provide a discrete opportunity for executive enforcement.[23] Yet, theoretically, an alleged violation that occurred as few as sixty-one days prior to the filing of the complaint in a citizen suit, and as to which no governmental enforcement determination had been made, would be sufficient to require a district court to hear the case. The same hypothetical violation would give rise to jurisdiction even if the appropriate administrative agencies had made an enforcement decision not to prosecute. In either event, exercise of the courts' jurisdiction effectively precludes or overrules the executive

23. Courts have undermined this process by allowing citizens to amend their complaints to allege violations which had not been identified in the original 60-day notice, without requiring any additional notice to EPA. *See, e.g., Chesapeake Bay Foundation v. Bethlehem Steel Corp.*, 608 F. Supp. 440, 450–51 (D. Md. 1985); *Kitlutsisti v. Arco Alaska, Inc.*, 592 F. Supp. 832, 842 (D. Alaska 1984), *vacated as moot*, 782 F.2d 800 (9th Cir. 1986).

agency's determination whether to penalize specific permit exceedances.[24]

A similar situation may arise where a permittee works in close communication and consultation with the federal or state permitting authority to perfect promising but experimental treatment technology. The agency's exercise of its enforcement discretion not to bring an action for violations of a NPDES permit while the permittee is working in good faith to fine tune or adjust new pollution control technology, or new applications of existing technology, should not be ignored or summarily rejected by a district court in a citizen suit.

If the regulated community cannot have confidence that positions it has negotiated in good faith with the regulators will not be subject to attack in parallel enforcement actions under section 505, a major incentive for industry to voluntarily engage in efforts to further the Act's goals will be eliminated. No permittee is likely to undertake experimental applications of technology under such circumstances, and valuable innovations thus may not be achieved.[25]

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24. It is not clear whether agency decisions not to enforce against specific permit exceedances are subject to judicial review, or if so, what the appropriate standard may be. *See Heckler v. Chaney*, 105 S.Ct. 1649 (1985). Without deciding these issues, courts hearing cases under § 505 have essentially disregarded the executive agency's judgment regarding appropriate enforcement of the Act. This runs counter to the fundamental principle of administrative law that courts should avoid substituting their own judgment for that of the agency on determinations of discretion and policy. K. Davis, *Administrative Law Treatise* § 29.00-1 at 520 (1982 Supp.).

25. EPA's administration of the NPDES program also may be more difficult as a result of recent citizen suits. Without the ability to rely on the Agency's proper exercise of enforcement discretion, permittees' vulnerability to such suits will lead them to oppose ELGs, challenge more proposed permits, and request more permit modifications in order to ensure that they can comply with permit limitations *all* of the time.

The foregoing are but a few examples of situations which arise under the complex, technical regulatory scheme of the Clean Water Act. If the law is to be executed in a fair and rational manner, and if the NPDES permitting process is to have integrity, enforcement of the Act must be coordinated by the Executive Branch as required by the Constitution.[26]

The dilemma that citizen suits pose for the regulators is reflected in the government's inability to adopt a rational, consistent position with respect to them. While professing not to oppose citizen suits per se, the Department of Justice has argued on behalf of EPA that "the United States is not and should not be bound" by their results unless the Executive joins as a party. Letter from Stephen D. Ramsey,

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26. The Executive's ability to intervene in citizen suits, 33 U.S.C. § 1365(c)(2), does not provide sufficient executive coordination and control of such suits. There is no indication that EPA could intervene in a citizen's action in order to stop that action from going forward where it has determined that no enforcement is appropriate, for example. *See Bethlehem Steel Corp. v. Train*, 544 F.2d 657, 660 (3d Cir. 1976), *cert. denied*, 430 U.S. 975 (1977). Nor should the government be required to expend its limited enforcement resources to intervene in every citizen suit.

Chief, Environmental Enforcement Section, U.S. Department of Justice, to the Honorable H. Lee Sarokin, United States District Court for the District of New Jersey 5 (January 3, 1985) [hereinafter cited as "Ramsey letter," App. A-1, A-6].[27]

The Ramsey letter plainly concedes that if citizen suits are deemed to bind the government—as they do and must[28]—such suits necessarily interfere with executive implementation and enforcement of the Act. The reasons offered for this conclusion shed light on the potential of citizen suits to undermine and divert executive enforcement of the Act. Mr. Ramsey notes, for example, that

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27. This position appears to have been considered and rejected by Congress in 1986, in the form of a House amendment to Senate Bill S. 1128, the Water Quality Act of 1986. The amendment would have incorporated the position into § 505. Joint Explanatory Statement of the Committee of Conference, 132 Cong. Rec. H10556, 10578 (daily ed. Oct. 15, 1986). It was deleted in conference committee, however, and failed to appear in the bill as finally enacted, *id.* President Reagan vetoed that bill, but Congress subsequently passed an identical bill, the Water Quality Act of 1987. 133 Cong. Rec. H191, 212 (daily ed. Jan. 8, 1987).

The government's position also is inconsistent with the structure of § 505 itself. There would be little need for citizens to notify EPA of their intent to sue if the Agency could essentially ignore that notice and bring a separate enforcement action on the same alleged violations if—and whenever—it believed one to be desirable. Recent amendments to § 505 even more strongly undercut the EPA/Ramsey argument by providing that citizens must serve copies of their complaints on the Executive, and that consent judgments may not be entered in citizen suits in which EPA is not a party prior to 45 days following receipt of copies thereof by EPA and the Attorney General. 33 U.S.C. § 1365(c)(3). These latter provisions were retained at the same time that the House amendment cited above was deleted in conference. 132 Cong. Rec. H10556, 10578 (daily ed. Oct. 15, 1986).

28. *Cf. United States v. ITT Rayonier, Inc.*, 627 F.2d 996, 1003 (9th Cir. 1980) (EPA precluded from relitigating violations already decided in proceeding brought by State). The identity of interest between § 505 plaintiffs and government agencies is apparent. See Argument I, *supra*.

> if the United States were legally precluded from filing a subsequent action because a citizen suit on the same violations had been resolved, the entire enforcement scheme envisioned by Congress would be disrupted. Under such circumstances, the United States would be forced to spend its limited resources monitoring and intervening in citizen suits in order to protect federal enforcement interests, thus destroying . . . government enforcement priorities . . . . Requiring the United States to intervene or lose its right to litigate a particular violation would also enable citizens and settling defendants to dictate an enforcement timetable to the federal government, contrary to the desire of Congress that the government be the primary enforcer of the statute.

Ramsey letter at 3–4, App. A-4 to -5.

Mr. Ramsey also noted that the motivation and priorities of citizen plaintiffs may differ from those of government enforcers.

> [A] private plaintiff has an interest in remedying the specific local problem that gave rise to his or her standing to sue. Such a plaintiff may not be interested in advancing the goals of the national law enforcement scheme or the broader public interest in an enforcement strategy that is oriented toward establishing favorable precedents of national applicability, developing consistency in particular areas of the law, and otherwise maximizing the deterrent effects of enforcement efforts. Allowing the public interest, as represented by the United States, to be bound by litigation between private parties would deprive all members of the public not sharing the parties' narrower interests of their day in court.

Ramsey letter at 4, App. A-5. While such private plaintiffs may indeed have other interests to advance, it is clear that *all* section 505 suits are actions to enforce the Act and are brought to vindicate the government's interest. The inconsistencies which result from private enforcement exemplify

the dangers of assigning executive authority to private persons not subject to the supervision of the Executive Branch.

Unlike executive officers under Article II, citizens suing under section 505 are accountable to no one. This state of affairs is antithetical to the Framers' notion of responsible government in general, and responsibility in the execution of the laws in particular. It violates the letter and the spirit of Article II of the Constitution.

CONCLUSION

For the reasons set forth in Petitioner's Brief, *amici* urge the Court to hold that the Clean Water Act does not authorize private citizens to sue for civil penalties for purely past violations of the Act. In the alternative, and for the reasons set forth herein, *amici* urge the Court to hold that the Act's grant of authority to private citizens to sue for civil penalties violates Article II of the Constitution.

Respectfully submitted,

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March 27, 1987

APPENDIX

Appendix

Washington, D.C. 20530
January 3, 1985

Honorable H. Lee Sarokin
United States District Court
District of New Jersey
United States Courthouse and
Post Office Building, Room 347
Newark, New Jersey 07102

Re: *Students Public Interest Research Group of New Jersey, Inc. v. Public Service Electric and Gas Company, Civ. No. 83-1603 SA*

Dear Judge Sarokin:

On May 21, 1984, the United States Environmental Protection Agency (EPA) was ordered to show cause why the proposed Consent Decree in the above-named action should not be entered. The government filed comments objecting to certain terms of the Decree. See the Response of the United States Environmental Protection Agency, Region II, Office of General Counsel, Water, Grants, and General Law Branch to Order to Show Cause. As set forth in that response, it is the United States' position that the above-named action, which was commenced pursuant to the authority of section 505 of the Clean Water Act, 33 U.S.C. 1365, does not in any way limit or restrict the power and authority of the government to address past, continuing, or prospective violations of the Act under its statutory enforcement authority pursuant to section 309 of the Act, 33 U.S.C. 1319.

We have recently received a brief filed by Plaintiff Student Public Interest Research Group of New Jersey and a

letter from counsel for Plaintiff. This letter is intended to clarify the United States' position in response to continued inquiry from counsel for both parties and the brief filed by Defendants. The government will of course be available to appear at any hearing set by the Court to address the matters set forth in this letter. We consider this issue to be of fundament [sic] importance to the government's ability to enforce environmental statutes and to the viability of citizen enforcement. Our views are as follows.

The United States' authority to enforce regulations, standards, and permit conditions established under the Clean Water Act is not affected by entry of a consent decree between two private parties in an action brought under section 505 of the Act. We are concerned that the language of paragraph 7, page 7 and paragraph 12, page 10 of the proposed Decree may be construed as limiting the enforcement powers of EPA. It is the United States' position that these provisions cannot and do not interfere with the rights of the United States. Nonetheless, to resolve all doubt regarding these provisions, the court may wish to refrain from entering the Decree until the terms of the Decree conform fully with the statutory scheme and existing law.

The court's authority to monitor the terms of a decree is well-settled. Prior to approving a consent decree a court must satisfy itself of the settlement's overall fairness to beneficiaries and consistency with the public interest. *Citizens for a Better Environment v. Gorsuch*, 718 F.2d 1117, 1126 (D.C. Cir. 1983), *cert. denied*, 104 S. Ct. 2668 (1984). In determining consistency with the public interest, the court must focus on the purposes the relevant statute is intended to serve. *Id.* at 1125; see *System Federation No. 91 v. Wright*, 364 U.S. 642, 651 (1961) (district court's authority to adopt a consent decree comes only from statute decree is intended to enforce, not from parties' consent to decree); *United States v. Motor Vehicle Mfrs. Ass'n of the United States, Inc.*, 643 F.2d 644, 650–51 (9th Cir. 1981) (parties may not enter into consent judgment inconsistent with stat-

utory framework under which action was brought). In determining that a decree is consistent with the Constitution and the mandate of Congress, that the terms of the decree are fair and adequate, and that the settlement is reasonable under the circumstances, the court must eschew any rubber stamp approval. *United States v. Seymour Recycling Corp.*, 554 F. Supp. 1334, 1337–38 (S.D. Indiana 1982); see *United States v. Hooker Chemicals & Plastics Corp.*, 540 F. Supp. 1067, 1072–73 (W.D.N.Y. 1982). Independent evaluation by the court is particularly important where, as here, the decree is based on a federal environmental statute and the United States is not a party. Accordingly, to the extent the court determines that the terms of the Consent Decree impermissibly purport to restrict the authority of the United States, the court may wish to require the parties to amend the Decree to conform to the Clean Water Act. In any event, however, the Decree does not and cannot preclude the United States from maintaining an action concerning the same violations addressed by the Decree.

Private citizen suits under the Clean Air and Clean Water Acts were intended to supplement and encourage federal and state enforcement efforts. See Environmental Policy Division, Congressional Research Service, *A Legislative History of the Clean Air Amendments of 1970*, at 263, 436–39 (1974). See also Environmental Policy Division, Congressional Research Service, *A Legislative History of the Water Pollution Control Act Amendments of 1972*, at 1497–98 (1973). Government enforcement, however, remains the primary mechanism for ensuring that the objectives of these Acts are achieved. Citizens must give notice to the United States prior to filing suit, and if the United States proceeds diligently with a judicial action, the private plaintiffs are foreclosed from proceeding. See, *e.g.*, section 505(b)(1)(A)(i) of the Clean Water Act, 33 U.S.C. 1365(b)(1)(A)(i).[1]

1 Citizens may intervene in a federal enforcement action, 33 U.S.C. §1365(b)(1)(B), and are permitted by regulation, 28 C.F.R. 50.7, to comment on proposed consent decrees.

In cases where the United States does not file an enforcement action, whether because of resource limitations or other factors, nothing in the Clean Water Act or its legislative history suggests that the preeminent government enforcement role could be undermined by private party litigation. Neither notice of the suit nor notice of a proposed or final settlement alters the United States' rights under the Act, absent intervention or control of the litigation by the United States. See *Montana* v. *United States*, 440 U.S. 147 (1979).

The continuing authority of the United States to institute an enforcement action following a suit by a private plaintiff has been repeatedly upheld. See, *e.g.*, *United States v. East Baton Rouge Parish School Board*, 594 F.2d 56 (5th Cir. 1979); see *Hathorn v. Lovorn*, 457 U.S. 255, 268 n.23 (1982); *City of Richmond v. United States*, 422 U.S. 358, 373–74 n.6 (1975); *Donovan v. Cunningham*, 716 F.2d 1455, 1462 (5th Cir. 1983). The authority exists because the interests of the United States and private plaintiffs are distinct. "The United States has an interest in enforcing federal law that is independent of any claims by private citizens." *United States v. East Baton Rouge Parish School Board*, 594 F.2d at 58. See generally 18 C. Wright & A. Miller, *Federal Practice and Procedure* [4458 at 517–20 (1981).

Indeed, if the United States were legally precluded from filing a subsequent action because a citizen suit on the same violations had been resolved, the entire enforcement scheme envisioned by Congress would be disrupted. Under such circumstances, the United States would be forced to spend its limited resources monitoring and intervening in citizen suits in order to protect federal enforcement interests, thus destroying both government enforcement priorities and the purpose of the citizen suit provision. As the court stated in the *United States v. East Baton Rouge Parish School Board*, 594 F. 2d at 58, binding the United States to private plaintiff litigation "would impose an onerous and extensive burden upon the United States to monitor private litigation in

order to ensure that possible mishandling of a claim by a private plaintiff could be corrected by intervention." Requiring the United States to intervene or lose its right to litigate a particular violation would also enable citizens and settling defendants to dictate an enforcement timetable to the federal government, contrary to the desire of Congress that the government be the primary enforcer of the statute.

Moreover, a private plaintiff has an interest in remedying the specific local problem that gave rise to his or her standing to sue. Such a plaintiff may not be interested in advancing the goals of the national law enforcement scheme or the broader public interest in an enforcement strategy that is oriented toward establishing favorable precedents of national applicability, developing consistency in particular areas of the law, and otherwise maximizing the deterrent effects of enforcement efforts. Allowing the public interest, as represented by the United States, to be bound by litigation between private parties would deprive all members of the public not sharing the parties' narrower interests of their day in court.

Finally, where the United States retains the authority to seek both compliance and penalties for the entire period of any noncompliance, including noncompliance that continues during and after a citizen suit, a defendant has an additional incentive to provide and adhere to a reasonable compliance schedule when negotiating with a citizen plaintiff. This promotes the statutory scheme.

In the Senate Report supporting the Solid Waste Disposal Act Amendments of 1983, which added to the citizen suit provision of that Act the same penalty provision present in the Clean Water Act, the concerns discussed above led the Senate to note expressly that private litigation of a request for civil penalties or the granting of such an award "will not, in any way, limit or preclude the right of the United States to seek or obtain the payment of penalties arising out of the same or related violations, except that the maximum

penalty to be paid for each violation shall not exceed that provided in section 3008" (the government enforcement provision). The United States agrees that under the Clean Water Act as well, the full extent of a violator's civil penalty liability may be recovered only once; however, as under the amended Solid Waste Disposal Act, the government may seek to recover any portion of a violator's potential civil penalty liability not recovered in a prior citizen suit. Similarly, assuming a continuing violation, the United States may seek to obtain compliance with the Clean Water Act and its implementing regulations more rapidly or more comprehensively than provided by the relief obtained in a prior citizen suit.

As a matter of practice, the United States will very rarely initiate an enforcement action following the resolution of a citizen suit. Limited federal enforcement resources will require the United States to evaluate carefully the results of a prior citizen suit and to weigh the need for and cost of an additional suit against other federal enforcement priorities. Only in unusual circumstances would the United States reverse its initial discretionary decision not to proceed against the violation in issue.

In sum, there are sound legal and policy reasons why the United States is not and should not be bound by the results of a citizen suit to which the government is not a party. Thus, the United States wishes to make clear that it does not consider itself bound in any way by the Decree. For the reasons discussed above, the court may wish to require modification of the terms of the Decree to reflect the structure and purposes of the Clean Water Act and existing case law.

We would be pleased to provide any additional clarification that is needed regarding our position on this issue.

Respectfully submitted,

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